

call. As such, the calls are local traffic. Contrary to Ameritech Michigan's argument, calls placed to an ISP at a local number are not exchange access traffic because they do not relate to the origination or termination of toll service. Further, these calls are not among the listed switched exchange access services that are exempt from reciprocal compensation. The failure to include calls to ISPs in that list is indicative of the parties' intent. Consequently, the Commission concludes that, on their face, the interconnection agreements support the complainants' argument that the disputed calls are ones for which Ameritech Michigan owes reciprocal compensation.

#### Implementation of the Agreements

In its brief, Ameritech Michigan suggests that it would be improper for the Commission to consider matters outside the "four corners" of the agreements, although it suggests that the Commission may consider the longstanding precedent that ISP traffic is not local traffic. On the other hand, Ameritech Michigan says that "there is nothing in the 'four corners' of the Agreements that says in so many words whether calls destined for ISPs are subject to reciprocal compensation. If there were, this dispute would never have arisen." Ameritech Michigan's brief, p. 19. In its reply brief, Ameritech Michigan says that the Commission can look to evidence outside the agreements to aid in the interpretation of technical or trade terms. Ameritech Michigan's reply brief, p. 5.

As discussed above, the Commission concludes that the terms of the agreements themselves resolve the question and require Ameritech Michigan to pay reciprocal compensation for the disputed calls. As discussed below, matters outside of the "four corners" of the agreements also lead to that conclusion.

Ameritech Michigan argues that neither the Commission nor the FCC has ever classified these calls as local traffic. In fact, it asserts that the FCC has unequivocally classified these calls as exchange access service. It says that contracting parties must be presumed to have full knowledge of the state of existing law. Accordingly, it argues, it was unnecessary for the agreements to specify that calls to ISPs were not local because everyone knew that the FCC has unmistakably defined the calls to be exchange access traffic, which is explicitly excluded from reciprocal compensation under the agreements.

Ameritech Michigan's argument is wrong. During the negotiation of its interconnection agreement, Brooks indicated its view that calls to ISPs were local and, as such, subject to reciprocal compensation. 3 Tr. 260-263. In addition, when implementing the interconnection agreements (and before those agreements, its interconnection tariff), Ameritech Michigan billed reciprocal compensation charges to other providers for calls terminated to ISPs that were customers of Ameritech Michigan and paid reciprocal compensation to other providers for calls terminated to ISPs on their networks. For example, Ameritech Michigan has paid reciprocal compensation to Brooks, first under a tariff and later under an interconnection agreement, since March 28, 1995. 3 Tr. 240-241. In addition, Ameritech Michigan billed Brooks for calls originating on Brooks' network and terminating to ISP customers on Ameritech Michigan's network. 3 Tr. 259. Under Ameritech Michigan's argument, it, like all other providers, must be held to the knowledge that those calls were not local or subject to reciprocal compensation. Rather than concluding that Ameritech Michigan unreasonably believed that only it could recover "reciprocal" compensation for ISP calls, it is more reasonable to conclude that Ameritech Michigan, like the complainants, viewed those calls as local and subject to reciprocal

compensation. Similarly, it is more reasonable to conclude that Ameritech Michigan did not cease paying reciprocal compensation for the disputed calls to correct a past "mistake" or to return to the clear meaning of the agreements, but rather to implement a policy change that it found advantageous.

It is reasonable to conclude that Ameritech Michigan changed its interpretation of the agreements only when another Bell operating company raised the issue in its service territory and Ameritech Michigan realized that the balance of payments was against it. Ameritech Michigan claims that it was not until April 1997 that it became suspicious that other carriers were improperly billing it for reciprocal compensation for calls to ISPs. 3 Tr. 474. It seems more than coincidence that the issue became important to Ameritech Michigan just as another Bell operating companies raised the issue in another state. 3 Tr. 505-506. Otherwise, one must believe that despite all of the Ameritech Michigan employees who were involved in the negotiation and implementation of the interconnection agreements, and despite the fact the Ameritech Michigan itself has ISP customers, it was not until April 1997 that any employee realized that people might be using computers at home and at work to call local telephone numbers to obtain access to the Internet.

Furthermore, the claim that Ameritech Michigan became concerned about improper billing by other providers in April 1997 because of the imbalance in payments is undercut by the fact that the imbalance existed from the beginning of the implementation of the agreements. 3 Tr. 260-261, 534. Further, Ameritech Michigan's position requires the conclusion that Ameritech Michigan, knowing full well that calls to ISPs were not subject to reciprocal compensation and knowing the difficulty in determining which local calls were calls to ISPs,

deliberately designed a reciprocal compensation billing system that cannot identify and separate out the calls to ISPs that are not subject to reciprocal compensation, and did not inform the complainants of those facts.<sup>2</sup> 3 Tr. 531-532.

Ameritech Michigan's argument must be rejected for other reasons as well. First, Ameritech Michigan treats calls to ISPs at local telephone numbers as local calls for purposes of imposing local charges under its tariffs, despite its claim that those calls are like interexchange calls, which it does not count or charge for as a local call. Exhibit J-1. Second, Ameritech Michigan treats the calls as local for purposes of call rating, billing, reporting, and separations allocations between interstate and intrastate jurisdictions. Exhibit J-1. Third, despite its claim that it is improper to pay reciprocal compensation for any call to any information provider at a local telephone number and despite acknowledging that ISPs are not the only information service providers, Ameritech Michigan has not sought to implement its new policy any more broadly. 3 Tr. 531.

The Commission therefore concludes that Ameritech Michigan's conduct and implementation of the interconnection agreements fully support a conclusion that those agreements require reciprocal compensation for calls to ISPs.

#### FCC Jurisdiction

Finally, Ameritech Michigan argues that, although the issue in these cases has been framed as a dispute about the interpretation of the interconnection agreements, the agreements cannot resolve the issue because only the FCC can decide whether the calls are local. Ameritech

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<sup>2</sup>As a result of this problem with its billing system, Ameritech Michigan continues to bill other providers for the reciprocal compensation that it claims is improper and then credits its bill to them based on estimates. 3 Tr. 531-532.

Michigan's position is that the FCC has already decided that these calls are not local, but rather are a form of access service for which the FCC has permitted the local exchange companies (LECs) to impose local charges while exempting the ISPs from the payment of access charges.

Ameritech Michigan acknowledges that the Commission has authority to resolve disputes about the interconnection agreements, but asserts that the FCC has exclusive jurisdiction to decide the one legal issue that is dispositive of this dispute. Therefore, it argues, for reasons of the Supremacy Clause, the FCC's exclusive jurisdiction, primary jurisdiction, noninterference with the FCC's jurisdiction in a pending docket, and administrative economy, the Commission must defer to the FCC and should stay these cases pending a decision in CCB/CPD 97-30, where the FCC has been asked whether these calls are local. Ameritech Michigan represents that the FCC should decide that issue shortly.<sup>3</sup>

The complainants dispute Ameritech Michigan's characterization of the FCC's prior actions. They assert that the FCC has classified ISPs as end-users, which means they do not purchase access service under interstate access tariffs and instead purchase local exchange service out of local tariffs. In the Matter of Access Charge Reform, First Report and Order, CC Docket No. 96-262, released May 16, 1997, para. 344-348. They further argue that the FCC has explicitly recognized that reciprocal compensation can provide the mechanism for the LECs to recover the costs of transport and local termination of calls to ISPs, to which interstate access charges do not apply. In the Matter of the Implementation of Local Competition, First Report and Order, CC Docket No. 96-98, released August 19, 1997, para. 1033-1034. Further, they note that the

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<sup>3</sup>At a hearing in Case No. U-11178 on September 24, 1997, counsel for Ameritech Michigan represented that a decision from the FCC was "likely" before the end of 1997 and expected "as early as November" 1997. Case No. U-11178, Tr. 43-44.

FCC has recently distinguished between the service used to connect to the ISP and the ISP's services:

We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network component, which is the connection over a LEC network from a subscriber to an Internet Service Provider, in addition to the underlying information service.

When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering.

In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, released May 8, 1997, para. 83 and 789 [footnote omitted].

In addition, the FCC has said:

We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connection to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.

Access Charge Reform order, supra, para. 346.

On the one hand, Ameritech Michigan seems to be arguing that only the FCC may decide how providers are to compensate each other for calls to ISPs and that, at least for now, the FCC has decided that ISPs should pay end-user charges, which permits Ameritech Michigan to charge local usage charges, among other things. On the other hand, apparently recognizing that its position means that there is no compensation due between providers for calls to ISPs, Ameritech

Michigan now argues that, if the Commission decides to proceed with a decision in these cases, it should direct the parties to implement some form of interim compensation mechanism modeled after meet-point billing arrangements, an alternative that Ameritech Michigan has only partially developed. That suggestion undercuts its argument that only the FCC is authorized to determine the proper payment for calls to ISPs. If the parties can agree to a compensation arrangement modeled after meet-point billing, it is not clear from Ameritech Michigan's argument why they should not be equally free to agree to reciprocal compensation, as they have already done.

Further, Ameritech Michigan's position depends on a conclusion that calls to ISPs cannot be separated into a local call and a subsequent communication with the information service provider. In another context, Ameritech Michigan has argued that information services are separate from the call made to access those services. 3 Tr. 163-164, 182-183.

The Commission concludes that it need not withhold a ruling at this time. The initial question in these cases is the interpretation of the interconnection agreements, a matter that the federal Telecommunications Act of 1996 (FTA) and Section 204 of the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., (MTA) place within the jurisdiction of the Commission. See Iowa Utilities Board v FCC, 120 F3d 753 (8th Cir. 1997).<sup>4</sup> As to the meaning of the FCC's prior rulings and pronouncements, the Commission is not persuaded that the FCC has ruled as Ameritech Michigan asserts. In fact, the FCC's more recent statements have moved away from the view upon which Ameritech Michigan's

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<sup>4</sup>Ameritech Michigan's January 16, 1998 request that the Commission take administrative notice of two arbitration awards from Texas could be viewed as a concession that the states have authority to act on the question of reciprocal compensation to ISPs.

position depends. When the FCC rules in the pending docket, the Commission can determine what action, if any, is required.

Finally, it should be noted that the Commission's action prevents Ameritech Michigan from creating a class of traffic for which no compensation is due, an outcome that would be inconsistent with the FCC's intent:

[S]tate commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5) [of the FTA], consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges.

Local Competition order, supra, para. 1035.

#### Effect of Decision

Ameritech Michigan argues that accepting the complainants' position will have an extremely disparate economic effect on all local exchange carriers that originate calls to ISPs served by another local exchange carrier. It says that the originating carrier will receive at most a small flat rate for the call while the terminating carrier will receive a much greater timed reciprocal compensation charge. For example, it says, an hour call to the Internet would permit Ameritech Michigan to receive at most 6.2 cents while the terminating carrier would receive up to 90 cents in reciprocal compensation. 3 Tr. 408.

The short answer is that the issue should be addressed when negotiating or renegotiating an interconnection agreement, not by one party unilaterally imposing a solution on the other party. Furthermore, Ameritech Michigan fails to acknowledge that the same disparity results from an hour long telephone conversation between two customers. It also fails to acknowledge that, for



short duration calls, whether to an ISP or another customer within the local calling area. Ameritech Michigan's charge to its customer can exceed the reciprocal compensation charge. Finally, Ameritech Michigan has informed the Commission that its basic local exchange rates are restructured, which means that the company has concluded on the basis of cost studies that its revenues for the service cover its costs. Presumably, local calls to ISPs are included within those studies because the company says on this record that it presently cannot separate out those calls.

### **Remedy**

The Commission concludes that Ameritech Michigan has unlawfully withheld reciprocal compensation since July 3, 1997. The Commission directs Ameritech Michigan to cease and desist from violating the terms of the interconnection agreements. Therefore, Ameritech Michigan shall immediately resume reciprocal compensation payments in accordance with the agreements and shall, within 10 days, pay the past due amounts, with interest as specified in the agreements. Furthermore, to make whole the complaining parties, as Section 601 of the MTA requires, the Commission orders Ameritech Michigan to pay the complainants' and intervenors' attorney fees. MCL 484.2601; MSA 22.1469(601). Finally, the Commission concludes that, under the circumstances, a fine is not required.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.;

MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended.  
1992 AACCS, R 460.17101 et seq.

b. A call using a local seven-digit telephone number to reach an ISP is local traffic subject to reciprocal compensation under the interconnection agreements for all minutes of use.

c. Ameritech Michigan withheld reciprocal compensation for calls to ISPs in violation of the MTA and the Commission's orders approving the interconnection agreements.

d. The ALJ's denial of Ameritech Michigan's motion to compel should be affirmed.

**THEREFORE, IT IS ORDERED that:**

A. The Administrative Law Judge's denial of Ameritech Michigan's motion to compel is affirmed.

B. The August 29, 1997 motion to compel payment of reciprocal compensation, filed by Brooks Fiber Communications of Michigan, Inc., is dismissed as moot.

C. Ameritech Michigan shall cease and desist from failing to pay reciprocal compensation in accordance with its interconnection agreements.

D. Ameritech Michigan shall immediately resume reciprocal compensation payments in accordance with those interconnection agreements and shall, within 10 days, pay the past due amounts, with interest as specified in the agreements.

E. Ameritech Michigan shall pay the complainants' and intervenors' attorney fees.

F. A copy of this order shall be placed in the docket in Case No. U-11104, the docket that the Commission opened for the purpose of consulting with the Federal Communications Commission on any request by Ameritech Michigan for interLATA authority under Section 271 of the Telecommunications Act of 1996, 47 USC 271.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand  
Chairman

( S E A L )

/s/ John C. Shea  
Commissioner, dissenting in part and  
concurring in part in a separate opinion.

/s/ David A. Svanda  
Commissioner

By its action of January 28, 1998.

/s/ Dorothy Wideman  
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner, dissenting in part and  
concurring in part in a separate opinion.

---

Commissioner

By its action of January 28, 1998.

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Its Executive Secretary

In the matter of the application for approval of an )  
interconnection agreement between **BROOKS** )  
**FIBER COMMUNICATIONS OF MICHIGAN,** )  
**INC.,** and Ameritech Information Industry Services )  
on behalf of **AMERITECH MICHIGAN.** )  
\_\_\_\_\_ )

Case No. U-11178 et al.

Suggested Minute:

“Adopt and issue order dated January 28, 1998 requiring Ameritech Michigan to pay reciprocal compensation for calls to Internet service providers, as set forth in the order.”

**STATE OF MICHIGAN**  
**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

In the matter of the application for approval of an )  
interconnection agreement between **BROOKS** )  
**FIBER COMMUNICATIONS OF MICHIGAN,** )  
INC., and Ameritech Information Industry Services )  
on behalf of **AMERITECH MICHIGAN.** )  
\_\_\_\_\_ )

Case No. U-11178 et al.

**DISSENTING AND CONCURRING OPINION**  
**OF COMMISSIONER JOHN C. SHEA**

(Submitted on January 28, 1998 concerning order issued on same date.)

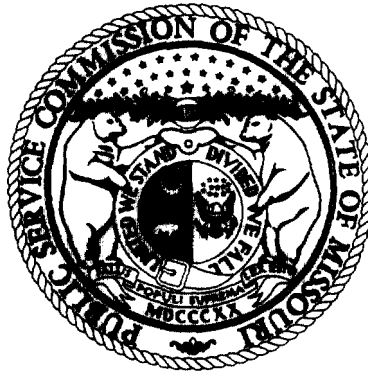
I join in the accompanying order except insofar as it imposes liability for attorney fees on Ameritech Michigan. Such a penalty is, in my view, at best, incautious given the lack of clear standards in place for such a penalty. I am also concerned that profligate use of this power could have unintended consequences, drawing the Commission away from its core regulatory mission. Accordingly, I concur in part and dissent in part.

**MICHIGAN PUBLIC SERVICE COMMISSION**

\_\_\_\_\_  
John C. Shea, Commissioner

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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In the Matter of the Petition of Birch Telecom of )  
Missouri, Inc. for Arbitration of the Rates, Terms, ) **Case No. TO-98-278**  
Conditions and Related Arrangements for Intercon- )  
nection With Southwestern Bell Telephone Company. )  
)

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**ARBITRATION ORDER**

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1998

**Issue Date:**

April 23,

**Effective Date:**

April 24, 1998

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF MISSOURI**

In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection With Southwestern Bell Telephone Company. )  
 ) **Case No. TO-98-278**  
 )

**APPEARANCES**

**Mark W. Comley**, Newman, Comley & Ruth, 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537,  
and

**Albert H. Kramer** and **Michael C. Casowitz**, Dickstein, Shapiro, Morin & Oshinsky LLP, 2101 L Street N.W., Washington, DC 20037-1526, for Birch Telecom of Missouri, Inc.

**Paul G. Lane**, General Attorney-Missouri, and **Anthony K. Conroy**, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3510, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

**REGULATORY LAW JUDGE:**      **Kevin F. Hennessey.**

**ARBITRATION ORDER**

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**Procedural History**



On December 31, 1997, Birch Telecom of Missouri, Inc. (Birch) filed a petition with the Commission to arbitrate terms of interconnection between Birch and Southwestern Bell Telephone Company (SWBT) pursuant to Section 252(b) of the Telecommunications Act of 1996 (the Act). The Commission notified SWBT of the petition for arbitration on January 8, 1998. Birch supplemented its petition on January 15 with a pleading indicating that the only disputed issue concerned whether calls made within the same local calling scope to an Internet service provider (ISP) are local in nature and subject to the payment of reciprocal compensation.

The Commission established a procedural schedule and adopted a protective order on January 27. The Commission directed Birch to file appropriate documentation concerning those issues which had been discussed and resolved by the parties as required by 47 U.S.C. 252(b)(2).

Birch filed its response on January 30 which included a copy of the proposed interconnection agreement and appendices agreed to by Birch and SWBT.

SWBT filed a response to Birch's petition for arbitration and a motion to dismiss on February 2. Birch responded with late-filed suggestions in opposition on February 17. The parties filed direct testimony on February 18 and rebuttal testimony on March 4. SWBT replied to Birch's suggestions in opposition on March 4 and also moved to strike the testimony of two Birch witnesses, Gary L. Chesser and Gregory C. Lawhon.

The parties met in a prehearing conference on March 9, at which time SWBT withdrew its motion to dismiss the petition for arbitration.

On March 12, the parties reached agreement regarding SWBT's motion to

strike. Birch agreed to withdraw the testimony of witnesses Chesser and Lawhon and file a revised version of Mr. Lawhon's testimony on the day of the hearing. SWBT agreed to withdraw its motion to strike and not to oppose the filing of the revised version of Mr. Lawhon's testimony.

The Commission conducted an arbitration hearing on March 16 and 17. The parties filed briefs on April 3.

SWBT submitted late-filed Exhibits 11, 12 and 13 as requested by the Commission on March 24. Birch did not object to these exhibits. On April 14, SWBT submitted a supplement to late-filed Exhibit 11. Birch responded by letter on April 16 stating that the material which SWBT sought to add to Exhibit 11 does not constitute a procedurally proper late-filed exhibit and contains information which is neither new nor helpful to the Commission in resolving this dispute. Birch stated that the "supplemental" constituted a re-argument of SWBT's position.

Birch filed a motion on April 16 seeking the Commission's permission to file as a post-record authority a copy of the Federal Communications Commission's (FCC) Report to Congress on Universal Service Issues; which was released on April 10, 1998. The parties filed a Stipulation on April 21 agreeing that the FCC Report is relevant to the arbitration and is an appropriate subject for official notice.

**Discussion** The parties to this case are not only in disagreement about the issues surrounding reciprocal compensation for ISP traffic, but also about the issues in this case. The parties filed a Hearing Memorandum on March 9, in which each party separately stated its understanding of Issues 1 and 2. The only agreement in the Hearing Memorandum was on the wording of Issue 3. This

**disagreement as to how the issues should be framed is core to the Commission's decision in this case.**

Birch phrases Issue 1 as: "Should Internet Service Provider ('ISP') traffic be treated as local traffic for purposes of reciprocal compensation under the Interconnection Agreement?" In contrast, SWBT states Issue 1 as: "Is a local exchange carrier (LEC) required, under the provisions of the Act, to pay reciprocal local compensation when one of its subscribers places a call to the internet through an Internet Service Provider that receives local exchange service from another LEC?"

Birch takes the position that ISP traffic, consisting of calls made within the same local calling scope to an ISP, is local traffic and should be treated as such by this Commission. SWBT takes the position that ISP traffic is jurisdictionally interstate in nature, is not local, and is not terminated on the network facilities of the LEC providing service to the ISP. SWBT believes that, under the Act, reciprocal local compensation is not applicable to such traffic.

Issue 2, as stated by Birch, asks whether, if the Commission determines that the traffic to ISPs should be treated as local traffic for purposes of reciprocal compensation, the rate should be different than for local traffic that is not terminated to ISPs. Birch also asks the Commission to decide whether additional language should be inserted into the Interconnection Agreement already negotiated between the parties to resolve the issue. SWBT states the issue as whether, if the Commission has jurisdiction over traffic to ISPs and reciprocal compensation applies, the parties should be required to negotiate a compensation rate for such traffic other than the rate established in the

parties' Interconnection Agreement for local traffic that is not directed to ISPs. Birch argues that the rate for traffic to an ISP should be the same as for traffic terminating to other users. SWBT argues that if the Commission finds that it has jurisdiction and that reciprocal compensation applies, the Commission should not order the parties to pay one another the same rate for traffic to ISPs as SWBT pays to other local exchange carriers for local traffic.

The parties stipulated that it would be appropriate for the Commission to take official notice of the FCC's Report to Congress in the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, released April 10, 1998. In a footnote included in that Report the FCC stated that it was making no determination on the question of whether LECs that serve ISPs are entitled to reciprocal compensation for terminating Internet traffic. The FCC went on to state that the issue is currently before it and is the subject of public and industry comments. The reader was referred to the Pleading Cycle Established for Comments on Requests by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, Public Notice, CCD/CPD 97-30 (released July 2, 1997).<sup>1</sup> The Public Notice referred to is included as Attachment A to this Order and states that the Association for Local Telecommunications has requested clarification that nothing in the FCC's Local Competition Order "requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements" in situations in which local calls to information service providers are exchanged between ILECs and CLECs. The FCC asked for comments on this

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<sup>1</sup> Report to Congress at Paragraph 106, Footnote 220.

request to be filed in July of 1997. To date, a decision has not been issued.

The parties' agreed-upon statement of Issue 3 reads: "If the Commission resolves issue 2 above in favor of SWBT, should the parties be directed to implement the interconnection agreement, subject to true up once the compensation rate for ISP traffic is determined?" The Commission has before it a proposed interconnection agreement between Birch and SWBT filed on January 30. The parties have agreed to each of the terms and conditions of the agreement, and concur that the agreement is substantially similar to agreements previously approved between SWBT and other CLECs. The only area of dispute concerns reciprocal compensation for traffic to ISPs. Birch's position is that language should be added to the agreement that would clarify that reciprocal compensation would be paid by either company to the other when calls to an ISP are terminated within the local calling scope. SWBT's position is that traffic to ISPs should be specifically excluded from reciprocal compensation provisions.

### **Findings of Fact**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all of the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

The Commission finds that no objections were filed to late-filed exhibits 11, 12, and 13 and they should be admitted into evidence. The Commission finds that the material SWBT proffered on April 14 as a supplement to Exhibit 11 is, indeed, a restatement of SWBT's legal arguments to the Commission. However, the letter submitted by Birch on April 16 is not a formal objection in compliance with the Commission's pleading rules. Accordingly, both SWBT's April 14 offering and Birch's April 16 letter will be received into the record and be given the weight they are due.

The Commission finds that it has jurisdiction over the issue because the federal Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 151 et seq., establishes jurisdiction in the Commission to arbitrate disputes between interconnecting local exchange carriers. See 47 U.S.C. § 252(b)(4). The Commission acknowledges that in the recent past the FCC has treated a call from an end user to an ISP within the local calling scope as local traffic. However, the Commission has been advised by the parties and takes official notice that, as to the crucial issue in this case, i.e. reciprocal compensation under this type of scenario, the FCC has requested comments and taken the matter under advisement in Docket No. 97-30. The record presented by the parties is not sufficiently persuasive to move this Commission to make a final decision on the reciprocal compensation issue in light of the FCC's pending proceeding on the same issue.

Moreover, because the parties presented the issue of whether such traffic constitutes local traffic only "for purposes of reciprocal compensation under the Interconnection Agreement,"<sup>2</sup> the Commission finds

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<sup>2</sup> This was the manner in which Birch stated the issue. See Issue 1,

that it would not be appropriate to determine whether the traffic to ISPs constitutes local traffic until the issue of compensation is resolved by the FCC. The Commission will direct the parties to file a notice with the Commission within ten days after the FCC makes its determination on the reciprocal compensation issue.

While the record is not sufficient for the Commission to make a final decision concerning the nature of the traffic and the appropriate compensation for it, the record does make clear that neither SWBT nor Birch can accurately distinguish calls to ISPs from calls to other end users at this time. For this reason, the Commission finds that calls to ISPs should be treated and compensated as if they are local calls by the parties pending the FCC's final determination of the issue.

Pending an FCC determination on the issue of reciprocal compensation, the Commission finds that an executed copy of the agreement should be filed for approval without any language that specifically addresses reciprocal compensation for traffic to ISPs. The language appearing on page 12 of the General Terms and Conditions of the agreement submitted on January 30, following Section 5.1.2, should not be included in the executed agreement.<sup>3</sup>

The evidence presented to the Commission was insufficient for the Commission to determine whether it will be possible for the parties to

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Birch's Separate Statement of The Issue, Hearing Memorandum filed March 9, p. 2. SWBT did not raise the issue of whether such traffic constitutes local traffic in the abstract, except in order to challenge the Commission's jurisdiction to decide the appropriate rate. See Issue 1, SWBT's Separate Statement of the Issue, Hearing Memorandum filed March 9, p. 3.

<sup>3</sup> This language provides: "The Parties disagree as to whether reciprocal compensation should apply to ISP traffic and what language, if any, should address that issue."

track the traffic at issue. Therefore, the Commission finds that Birch and SWBT should submit a proposed tracking plan and implementation schedule for such plan within 30 days after this Report and Order takes effect.

If a method for tracking traffic to ISPs can be developed and approved by the Commission, the Commission finds that a true-up procedure should be established following the FCC's determination of the issue to ensure that the parties compensate or refund one another, as appropriate, for the traffic exchanged during the period of time between the implementation of their Interconnection Agreement and the end of the true-up period.

### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

The parties to this case are public utilities subject to the jurisdiction of the Missouri Public Service Commission under Chapters 386 and 392, Revised Statutes of Missouri 1994 and the 1997 Supplement.

The Commission has jurisdiction to resolve this case by means of arbitration under Section 252 of the federal Telecommunications Act of 1996. The Commission must conclude the resolution of the issues no later than nine months after the date on which the local exchange carrier received the request for interconnection, in this case no later than April 25, 1998. § 252(b)(4)(C). The Commission must resolve the disputed issues and ensure that the arbitrated agreement meets the requirements of Section 251 of the Act.



CASES 97-C-1275, 93-C-0033, 93-C-0103, 97-C-0895,  
97-C-0918, and 97-C-0979

Several parties subsequently filed complaints or sent letters<sup>1</sup> alleging that NYT's action was a breach of the terms of NYT's P.S.C. No. 914 tariff and/or individual interconnection agreements. By a letter from the Acting Director of the Communications Division, NYT was advised that its unilateral action regarding internet traffic had not been approved by the Commission and that NYT should cease its attempts to avoid payment for such traffic.

RTC believes the issue is best addressed in either the access charge or network elements proceeding. However, although RTC recently filed limited testimony in the access charges proceeding (proposing that access charges be levied on internet service providers directly for calls terminated to them), no other party filed testimony on the issue, and no internet service providers have participated in that proceeding. Consequently, it does not appear that the issue will be fully developed in the current phase of the access charge proceeding. Nor is the issue currently under review in the network elements proceeding.

In order to consider these issues expeditiously, we will institute a proceeding to examine the issues raised by NYT's actions and by the RTC petition. Initially, written comments will be solicited on these issues, including:

- 1) The specific characteristics of internet calling and the unique costs associated with originating and terminating such traffic;
- 2) Whether and why calls placed to a local number of an internet service provider should be treated differently from local calls placed to other numbers generally; and
- 3) What basis exists to support the contentions of network congestion peculiar to internet services.

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<sup>1</sup>All letters previously received by the Commission since April 1997 regarding this matter will be considered in this proceeding. There is no need to resubmit such communication as a formal complaint.